BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JESSICA L. HUGUNIN Claimant VS. **SHAWNEE MISSION MEDICAL CENTER** Respondent AND **SELF INSURED** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	)	Docket No. 155,573

ORDER

The Kansas Workers Compensation Fund appeals from an April 8, 1994, Award entered by Administrative Law Judge Alvin E. Witwer.

APPEARANCES

Claimant appeared by and through her attorneys, William G. Manson and James E. Schwartze of Kansas City, Missouri. Respondent appeared by and through its attorney, H. Wayne Powers of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Laura J. Bond of Overland Park, Kansas.

RECORD & STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the April 8, 1994, Award.

ISSUES

The parties have asked for review of the decision by the Administrative Law Judge regarding the nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties have stipulated that claimant met with personal injury by accident arising out of and in the course of her employment on May 21, 1990. The evidence established that an injury occurred when the claimant helped lift a patient. The injury was to the low back.

Claimant was initially treated by Dr. Satish C. Bansal. Dr. Bansal provided conservative treatment, including an epidural block, a TENS unit and a back brace. On June 25, 1990, Dr. Bansal returned claimant to light-duty employment. He took her off work again in August 1990 for epidural blocks. The epidural blocks gave her some relief and she returned briefly to normal duties. She continued working part time until October 1990 when she was again taken off work. She has not returned to work since. Claimant was also seen by Dr. Erik Nye, an orthopedic surgeon. He treated the claimant with physical therapy and work hardening.

The injury at issue in this claim is not the first low back injury claimant has suffered. She injured her low back in April 1984, and was also treated by Dr. Bansal for this injury. Claimant testified that her back had been a chronic problem since her first injury in 1984. She indicated, however, that it had not ever been as bad as it became after her May 21, 1990 injury.

Claimant also suffered from numerous other injuries and illnesses. She had undergone knee surgery on six or seven (6-7) occasions. She suffered from asthma, ulcers, migraine headaches, hypertension, depression and bladder problems. She had a chronic ankle injury and had undergone surgery for bunions.

Six (6) physicians testified regarding the nature and extent of claimant's injury and functional impairment. Each gave an assessment of the functional impairment due to the low back injury alone. Several concluded that the low back injury, together with the other injuries and illnesses, rendered claimant essentially unemployable. After reviewing the evidence as a whole the Appeals Board concludes that the back injury did tip the scales and rendered claimant essentially unemployable.

Dr. Bansal testified that he first saw claimant in February 1981 and first saw her for low back problems in April 1984. In 1984 he diagnosed an acute lumbar strain with chronic spondylolysis at L-5. He saw her again on May 21, 1990 for back injury and diagnosed lumbar strain with left sciatica. Dr. Bansal testified that he did not believe the back pain would preclude her from engaging in employment. He did recommend restrictions. He suggested that she not lift anything from ground level which weighs more than twenty to twenty-five (20-25) pounds and not carry anything heavier than forty to fifty (40-50) pounds. He suggested that she not engage in any repetitive or sustained bending. He concluded that she would be able to do some light work with restrictions recommended if it involved sitting for some time and then getting up to walk around. He felt she should stand up every five to ten (5-10) minutes. He did not believe she could go back to work as a nurse's assistant. He had recommended that she pursue social security disability benefits. While he would not say she is totally disabled from her back injury alone, he did ultimately conclude that, taking into consideration all of her injuries, she would not be able to work in any capacity and not be able to find a job. In his opinion she would not be able to obtain any gainful or substantial employment.

Dr. Nye, the other treating physician, gave similar but less definite opinions regarding claimant's ability to return to any kind of employment. He testified that she could not go back to work in nursing. He described her initially as one-hundred percent (100%) occupationally disabled. However, upon cross examination he testified that by one-hundred percent (100%) occupationally disabled he meant that she could not do the job that she was doing. He stated that he was not certain if there were jobs she could do.

In addition to two treating physicians, four other physicians testified for the various parties involved in this claim. Each testified more or less along the lines of the interest of the parties presenting their testimony. Dr. Anthony M. Hicks examined claimant and offered testimony on the behalf of Kansas Workers Compensation Fund. He expressed his opinion that the injury of May 21, 1990, did not contribute additional permanent partial disability. Dr. Edward J. Prostic and Dr. P. Brent Koprivica testified the examinations they performed were at the request of the respondent. Both testified that in their opinions the injury of May 21, 1990, caused additional impairment which would not have occurred but for the pre-existing impairment. Dr. Prostic believes claimant was capable of engaging in some kinds of employment. Dr. Koprivica testified that claimant was capable of doing some kinds of work. He concluded, however, that she was essentially totally disabled and unable to be employed taking into consideration the overall picture from a disability standpoint. He felt a key element in this overall disability was her psychological condition. Dr. Harry B. Overesch, on the other hand, testified on behalf of the claimant. From his examination and evaluation he testified that it was his opinion that claimant is permanently and totally disabled. When asked if this meant there was no job she could maintain, he responded, "That's a big statement, but I think in her case that she wouldn't be able to."

The respondent, claimant and the Fund each employed and offered testimony of vocational experts. Patricia L. Perdaris testified on behalf of the Fund that, in her opinion, claimant has a sixty to seventy percent (60-70%) loss of her ability to compete in the open labor market and projected that post-injury she should be able to earn $5 per hour, which would produce a fifty-nine percent (59%) loss of ability to earn a comparable wage when compared to a pre-injury average weekly wage of $463.65. Mr. Gary Gammon testified on behalf of the respondent that claimant suffered a reduction of sixty-eight and eighty-one hundredths percent (68.81%) of ability to perform work in the open labor market and a thirty-two percent (32%) loss of ability to earn a comparable wage.

The Appeals Board finds, however, more convincing the testimony of Donald R. Vogenthaler, Rh.D. He testifies that, in his opinion, she has lost one-hundred percent (100%) of her ability to earn a comparable wage or obtain employment in the open labor market. He states several reasons for his conclusion. First he notes that she has persistent distracting pain. He notes that in order to alleviate the pain she goes through a cycle requiring that she stand, sit, lie down and walk during the course of the day. He acknowledges physician restrictions do not require that she lie down, but do indicate that she has to alternate between sitting and standing. An added reason he gives relates to the vocational testing he did. She scored very low on the vocational testing he performed. The final reason relates to her manual dexterity which he indicates is also very limited. He concludes that no reasonable employer in the normal course of employing individuals would employ claimant.

As the party liable for the benefits awarded, the Workers Compensation Fund has argued that the fifty percent (50%) permanent partial impairment award granted by the Administrative Law Judge, fails to take into consideration pre-existing work restrictions. All

of the physicians testified that claimant should have had work restrictions prior to the injury at issue in this claim. Each testified that had they had the opportunity to recommend restrictions, they would have recommended restrictions that were the same or at least similar to those they recommended after the injury. The Appeals Board finds that this argument fails for two reasons. First the physicians did not, in fact, recommend such restrictions prior to the injury at issue in this case. Second, even though claimant's work capacity may have been marginal prior to this subject injury, she was functioning in a work environment and earning a wage. Permanent total disability is defined in K.S.A. 44-510c as inability to engage in any substantial gainful employment. The Appeals Board further finds, based upon the record as a whole, the claimant, as a result of her injury, has become permanently and totally disabled. She is, as a practical matter, unable to engage in any kind of substantial and gainful employment. See Wardlow v. ANR Freight Systems, Inc., 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

The Appeals Board otherwise adopts all findings made by the Administrative Law Judge not inconsistent with express ruling made herein. This includes the finding of one-hundred percent (100%) of the liability should be paid by the Kansas Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer, dated April 8, 1994, shall be, and hereby is, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN FAVOR of the claimant, Jessica L. Hugunin, and against the respondent, Shawnee Mission Medical Center, Self-Insured, and the Kansas Workers Compensation Fund, for permanent total disability compensation for an accidental injury which occurred May 21, 1990 and based upon an average weekly wage of $463.65. Claimant is, therefore, entitled to benefits at the then maximum rate of $271.00 per week to be paid until payments reach the total of $125,000, the maximum allowed.

As of March 3, 1995, there is due and owing claimant 249.71 weeks of permanent total disability compensation at the rate of $271.00 per week or $67,671.41, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $57,328.59 is to be paid at the rate of $271.00 per week, until the $125,000 maximum is fully paid or until further order of the Director.

Further award is made that the claimant be granted future medical treatment at the expense of the Kansas Workers Compensation Fund, as herein found solely liable.

Further award is made that the Kansas Workers Compensation Fund be responsible for 100% of all compensation benefits herein awarded the claimant, as well as 100% of medical and hospital expenses, temporary total disability compensation and temporary partial disability compensation previously paid the claimant by the respondent.

Further award is made that the claimant's contract of employment with her attorneys, Mr. William G. Manson and Mr. James E. Schwartze, has not been made a part of the record. However, the claimant's attorneys are granted a lien against the proceeds of this award of not more than 25% pursuant to K.S.A. 44-536.

Further award is made that all necessary fees to defray the expense of the administration of the Kansas Workers Compensation Act for the State of Kansas be assessed against the Kansas Workers Compensation Fund as follows:

Hostetler & Associates, Inc.	$2,898.90
John M. Bowen & Associates	$2,113.70

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William G. Manson, Kansas City, MO
James E. Schwartze, Kansas City, MO
H. Wayne Powers, Overland Park, KS
Laura J. Bond, Overland Park, KS
Alvin E. Witwer, Administrative Law Judge
George Gomez, Director